BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LANCE M. HENDERSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,029,911
GOODYEAR TIRE & RUBBER COMPANY	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the November 8, 2006 preliminary hearing Order of Administrative Law Judge Brad E. Avery.

ISSUES

1. Did claimant's accidental injury arise out of and in the course of his employment with respondent?

2. Is claimant entitled to medical treatment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant had worked for respondent for nearly 6 years when, on May 20, 2006, while working as a banbury helper, he was struck below the right knee in the back of his lower right leg by a bail of rubber. Claimant felt a pull or strain in the right knee as a result of this incident. The injury was reported to respondent, and claimant filled out an incident report after the accident. This incident was verified by claimant's co-worker, Troy Smith.

Claimant was referred to the company dispensary, then to Myron J. Zeller, M.D., and then to Craig L. Vosburgh, M.D., of the Tallgrass Orthopedic Clinic.

Respondent objects to claimant's entitlement to benefits, alleging that claimant's condition in the right knee is a preexisting condition. Claimant had earlier sought treatment with Edward R. Wood, M.D., on April 24, 2006. At the time of the April 24 examination, claimant was experiencing long-term heartburn, pain symptoms in his right elbow and right knee discomfort, which was most annoying along the lateral joint line.[1] Dr. Wood noted claimant's range of motion in the knee was normal, without crepitation, although minimal effusion was present. He diagnosed claimant with probable osteoarthritis of the right knee. When claimant saw Dr. Wood on May 5, 2006, the doctor's impression of the knee was that it was a normal knee, although with mild sclerosis of the medial tibial plateau. No treatment was provided.

When claimant was referred to Dr. Vosburgh, he was diagnosed with a strain to the right knee. X-rays of the knee were read as normal, but due to a concern that claimant had damaged the meniscus, an MRI was recommended. This test was not performed due to respondent's denial of the claim. The past history section of Dr. Vosburgh's June 22, 2006 report indicates claimant had experienced no previous difficulties with the right knee. The matter proceeded to preliminary hearing on November 2, 2006, to determine claimant's entitlement to benefits for the alleged knee injury.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

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[1] P.H. Trans., Resp. Ex. A.

[2] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2005 Supp. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[6]

Respondent disputes claimant's entitlement to benefits, arguing that claimant's condition preexisted and contesting claimant's credibility. This Board Member acknowledges claimant had preexisting right knee complaints, as noted in the medical records of Dr. Wood. However, the symptoms documented in the medical notes of Dr. Wood are minimal at best. Additionally, even if claimant had prior problems, the law in Kansas allows a claimant to obtain workers compensation benefits for a preexisting condition if the work injury aggravates that preexisting condition. Here, claimant's description of the accident is uncontradicted.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[7]

Additionally, the accident was reported immediately, an incident report was prepared, and claimant's co-worker, Mr. Smith, verified that claimant told him of the accident immediately after the incident took place. Plus, Mr. Smith testified that claimant had displayed no right leg problems before the accident and showed a definite tendency to favor the leg after the accident. This Board Member finds claimant's testimony, coupled with that of Mr. Smith, convincing. Claimant has proven, for preliminary hearing purposes,

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[7] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

that he has satisfied his burden in this matter that claimant suffered an accidental injury arising out of and in the course of his employment with respondent.

Respondent also objects to claimant's entitlement to medical treatment.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[8]

Here, the Administrative Law Judge had the jurisdiction to determine claimant's entitlement to an award of benefits for ongoing medical care necessitated by a work-related injury. The Board does not take jurisdiction of that issue on appeal from a preliminary hearing order. Respondent's appeal on that issue is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the preliminary hearing Order of Administrative Law Judge Brad E. Avery dated November 8, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[8] K.S.A. 44-534a(a)(2).

[9] K.S.A. 44-534a.

Dated this ____ day of February, 2007.

BOARD MEMBER

c: Michael J. Unrein, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge